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UNITED STATES SUPREME COURT

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JOHN GLAVEY
Appellant
vs.
THE UNITED STATES
Respondent
} No. 235

POINTS FOR APPELLANT

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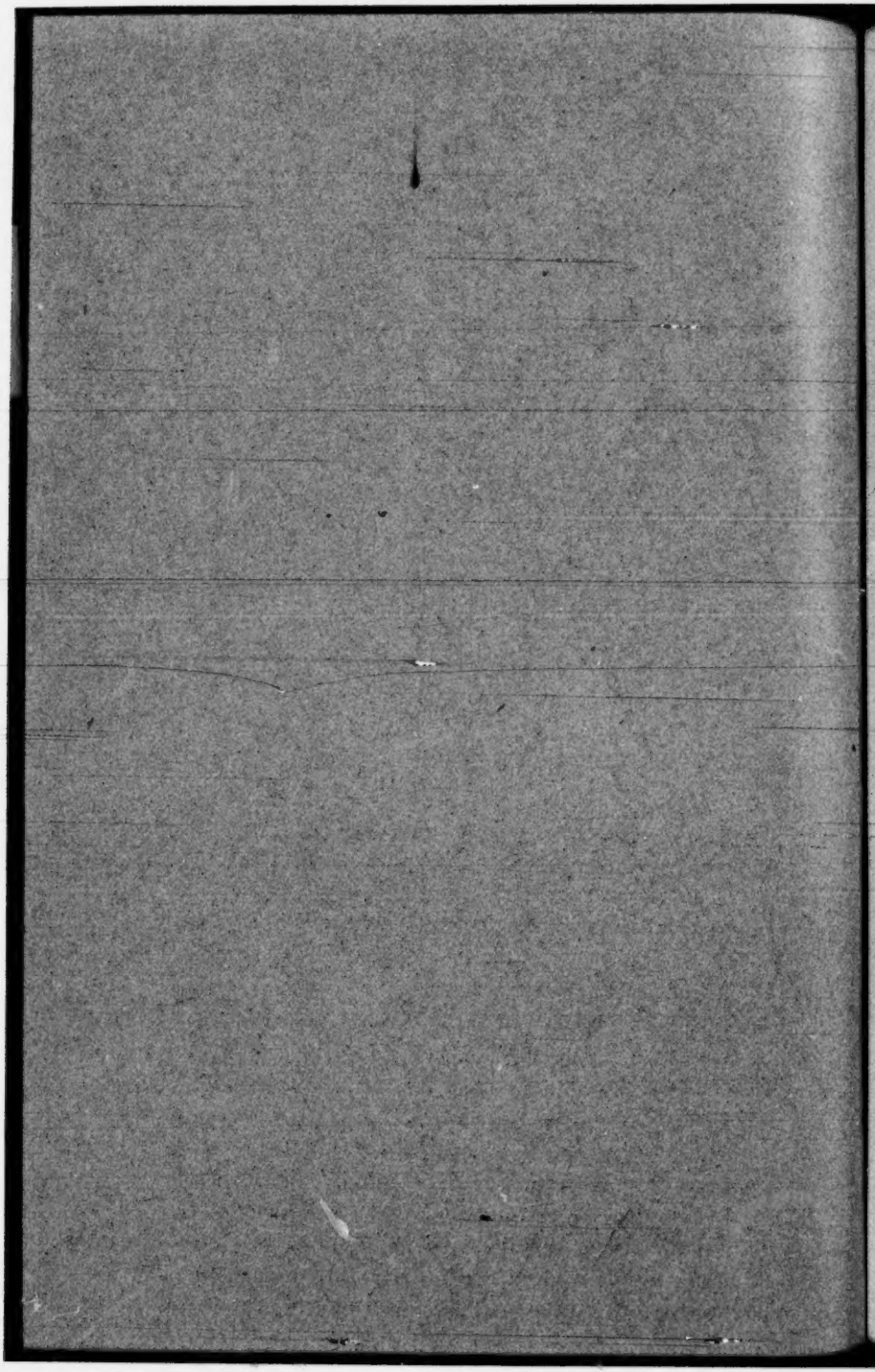

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IN THE

UNITED STATES SUPREME COURT.

JOHN GLAVEY,
Appellant,

vs. No. 235.

THE UNITED STATES.

POINTS FOR APPELLANT.

This is an appeal by the Petitioner from a judgment of the Court of Claims dismissing the petition.

The action is brought to recover salary due from the United States to the petitioner as Special Inspector of Foreign Steam Vessels.

The Act of Congress of August 7th, 1882 (22 U. S. Stat. at Large, p. 346), by its first section provided that "foreign steam vessels carrying passengers from any port in the United States to any other place or country," should be subject to the provisions of certain sections of the Revised Statutes of the United States, which it proceeded to specify. By its second section it provided that for

the purpose of carrying this Act into effect, the Secretary of the Treasury "shall appoint sixteen officers to be designated as Special Inspectors of Foreign Steam Vessels, *at a salary of two thousand dollars per annum each.*"

On the 15th day of May, 1891, the petitioner was appointed by the Secretary of the Treasury a Special Inspector of Foreign Steam Vessels for the port of New Orleans, La., "the appointment to take effect from the date of oath."

On the 25th of May, 1891, the petitioner took the oath of office and entered on the discharge of his duties, and continued in the office till the 27th day of May, 1894, and he brought this suit to recover against the United States the salary attached, by the second section of the Act of 1882, to the office of Special Inspector of Foreign Steam Vessels, at the rate of $2,000 per annum, for the period during which he held that office.

The Court of Claims by a divided Court (three Judges against two) decided against the petitioner, who brings this appeal.

Since that decision the case of Miller v. The United States involving the same question has been decided in the U. S. Circuit Court in accordance with the views of the minority (103 Fed. Rep. p. 415) and will be referred to hereafter.

First Point.

On the Findings made the Petitioner was entitled to a decree.

The findings of fact made by the Court of Claims set forth the appointment of the petitioner in full

(fols. 5 and 6), also that the Petitioner took the oath of office (fol. 6), from which date (May 25th, 1891) the appointment was to take effect, and that from that time until May 27th, 1894, he "performed the duties of said office as Special Inspector of Foreign Steam Vessels, a period of three years and two days" (fol. 7).

On these findings it would seem that there was no question but that the Petitioner was entitled to the salary affixed by law to that office and that the decision against him was erroneous, and should be reversed.

Second Point.

The First, Second, Third and part of the Seventh Findings are immaterial.

The Court also made some other findings of fact, but they are utterly immaterial to the questions in the case.

(1). The first finding was that on April 17th, 1891, a month before the appointment in question, the petitioner was appointed Local Inspector of Hulls and performed the duties of that office till May 27th, 1894.

If the salary of an Inspector of Hulls had been $2,500 this would have been pertinent, and would have brought the Petitioner within the provisions of Section 1763 of the Revised Statutes. But as the salary of such Local Inspectors of Hulls was only $2,250 per annum, (Revised Stat. Sec. 4413)

that section of the Revised Statutes has no application.

And the case of the U. S. v. Saunders (120 U. S., p. 126) is a decision of this Court that "that legislation has no application to the case of two distinct offices each of which has its own duties and its own compensation, which offices may both be held by one person at the same time. In the latter case he is in the eye of the law two officers or holds two places or appointments the functions of which are separate and distinct. *And according to all the decisions he is in such case entitled to recover the two compensations.*"

That finding of the Court below is therefore immaterial.

(2). The second finding of the Court below is also immaterial. How a report of the Supervising Inspector General made nearly two years before the Petitioner's appointment can have any bearing upon the rights of the Petitioner under his appointment is not to be seen under any known law or practice.

(3). Equally immaterial is the extract from the Report of the Secretary of the Treasury quoted in the third Finding of the Court.

The law in question was not repealed until March 1st, 1895. And it has never yet been heard that a recommendation by the Secretary of the Treasury that a law be repealed was equivalent to its repeal.

The third Finding states that the services of a Special Inspector of Foreign Steam Vessels at New Orleans had been "dispensed with." It should be noted that the Statute provided for two such Inspectors at New Orleans. And the fact that the

services of one of them had been dispensed with in 1889, has no bearing on the appointment of the Petitioner in 1891.

(4). The correspondence between the Secretary of the Treasury and the Petitioner *as Inspector of Hulls*, set forth in the Seventh Finding has nothing to do with his rights as Special Inspector of Foreign Steam Vessels.

This finding is therefore also immaterial.

Third Point.

It would seem that, as the Statute in question directs that these officers "shall be appointed by the Secretary of the Treasury" with a salary of $2,000 per annum and as the Court has found that the Petitioner on May 15th, 1891, received from the Secretary of the Treasury a letter saying "you are hereby appointed" "the appointment to take effect from date of oath," and has also found that the petitioner took the oath of office (which by Sec. 1756 of the Revised Statutes every person "appointed to any office" is required to take "before entering upon the duties of such office") and has found that the Petitioner "performed the duties of said office as Special Inspector of Foreign Steam Vessels for a period of three years and two days," the Petitioner was entitled to judgment that he recover the Salary which the Statute affixed to the office, without further discussion.

But as the Court of Claims in its opinion discussed various other questions we suppose we must also discuss and reply to them.

Fourth Point.

The language of the appointment of the Petitioner in the two clauses (1st) "to serve in connection with your appointment as Local Inspector of Hulls," and (2d) "without additional compensation," had no effect to change the appointment.

(1). "The duties of Special Inspectors of Foreign Steam Vessels" were fixed and governed by the Statute. And so were their rights.

They were exactly the same, whether the appointee was "to serve in connection with" anything else or not. Those words made not a particle of difference as to the duties which the Petitioner was to perform.

(2). Under the words of the Statute of 1882, the Secretary of the Treasury had no power except to appoint the officer; and when the officer was appointed, the Statute gave him a right to the salary of two thousand dollars per annum, which the Secretary of the Treasury had no power to take away.

It would be most extraordinary, if, when Congress had seen fit to attach a salary to an office, the incumbent of any Department of the Government, whom Congress had clothed with the power *to appoint to the office* (even were it the Chief Executive of the Government), could repeal that Act of Congress, or that part of the Act by which the salary was attached to the office. Yet that is what the Secretary of the Treasury attempted to do. Congress said that the Secretary of the Treasury should appoint these officers "at a salary of

Two Thousand Dollars per annum each." The Secretary assumed to say, "I will appoint; but I will override the will of Congress which attached the salary to the office. I will repeal that clause of the Act." Such an action of the appointing power is a most dangerous interference by the Executive power with the Legislative power.

The attempted exercise of such a power by the appointing power has come before the Courts. And in every case the Courts have sustained the view which we maintain.

Thus in Adams' Case (20 Court of Claims Rep. p. 117), the Court said, "Where the law creates the office and fixes the compensation, the appointing power has no control beyond the limits of the Statute, over the compensation, either to increase or diminish it."

To the same effect is Garlingers' Case (30 Id. p. 217); Goldsborough v. the United States, Taney's Dec. p. 88; King v. the State of N. Y., 93 N. Y., 294. And see Upton's Case (19 Court of Claims Rep. 49).

In Goldsborough v. The United States, Judge Taney says: "Where an Act of Congress declares that an officer of the Government or Public Agent shall receive a certain compensation for his services, which is specified in the law, undoubtedly *that compensation can neither be enlarged or diminished by any regulation or order of the President, or of a Department*, unless the power to do so is given by Act of Congress."

The above cases were cases of attempted diminution of a salary fixed by Statute. But it would seem that, if the Secretary of the Treasury has no power to diminish a salary fixed by Statute, *a fortiori* is he without power to take it away en-

tirely. It might as well be claimed that the Executive had power to *attach* a salary to an office which Congress had enacted should be without salary, or to *double* the salary which Congress had attached to an office, as that it had power to take it away. It might as well be claimed that the Secretary of the Treasury had power to appoint the Petitioner to this office "at a salary of *Four* thousand dollars a year" as to say that he had power to appoint him "at a salary of *nothing* a year."

It was beyond the power of the Secretary of the Treasury to do either.

Congress gave the Secretary the power to appoint, and that alone. It had itself exercised its own function of fixing the salary. And when the Secretary had exercised the power of appointment, his power was at an end. He had no more power to say, "without compensation" or "without additional compensation," than he had to say, "on condition that you divide the salary with me."

The Court of Claims in Upton's Case (19 Ct. of Claims 49) said, "A Statute, which establishes a salary or prescribes the rate of remuneration, expresses the intent of both parties, as a written agreement does in the case of private employers and employees, and *assures to a Government official a fixed and certain compensation for his services.*"

So this Act of 1882 which created this office assured to the person appointed to be such Government official a fixed and certain compensation for his services, viz., the salary of $2,000 per annum fixed by the Act, and the words of the Secretary "without additional compensation" have no force.

A somewhat similar question, as to the power of

the Secretary of the Navy, came before this Court in the case of the U. S. v. Symonds, 120 U. S., p. 46. In that case Section 1556 of the Revised Statutes had provided that a lieutenant in the Navy was entitled to receive annual pay after five years designation, at the rate of $2,600, "when at sea." Symonds who was such a lieutenant, was appointed to command the United States Training Ship "New Hampshire," at Norfolk, Va. Afterwards, the Secretary of the Navy issued an order that after such a date certain vessels, among which was the New Hampshire, "would not be considered as being in commission for sea service." And after that date Symonds was only allowed compensation at the rate for shore duty, instead of the rate when at sea. He brought suit to recover the difference. The Court held that the New Hampshire was "at sea," within the meaning of the law; and it decided that Symonds was entitled to be paid at the rate provided for such an officer "at sea," using this language: "Congress certainly did not intend to confer authority upon the Secretary of the Navy to diminish an officer's compensation as established by law, by declaring that to be shore service which was in fact sea service, or to increase his compensation by declaring that to be sea service which was in fact shore service. The authority of the Secretary to issue orders, regulations and instructions, with the approval of the President, in reference to matters connected with the naval establishment, is subject to the condition necessarily implied, that they must be consistent with the Statutes which have been enacted by Congress in reference to the Navy. He may with the approval of the President, establish regulations in execution of or supplemental to, but not in conflict with, the Statutes defining his powers, or conferring rights upon others. The

contrary has never been held by this Court. What we now say is entirely consistent with Gratiot v. The U. S., 4 How. 80, and *Ex parte* Reed, 100 U. S. 13, upon which the Government relies. Referring in the first case to certain Army Regulations, and in the other to certain Navy regulations, which had been approved by Congress, the Court observed that they had the force of law. See also Smith v. Whitney, 116 U. S., 181. In neither case however, was it held that such regulations, when in conflict with the Acts of Congress, could be upheld. If the services of Symonds were in the meaning of the Statute performed "at sea," his right to the compensation established by law for sea service, is as absolute as the right of any other officer to his salary as established by law."

This case is referred to and followed in the case of the U. S. v. Barnette, 165 U. S., p. 179.

It must follow, *a fortiori*, that if the Secretary of a Department has no authority to diminish an officer's compensation, as fixed by law, by any general regulation, he has no power to diminish it or take it away by any words inserted in the appointment of the officer. The language in the Symonds case, that the Secretary "may establish regulations in execution of, or supplemental to, but *not in conflict with the Statutes defining his powers, or conferring rights upon others*," is expressly applicable. The Statute in question defined the power of the Secretary to be the power of appointment of the officer only. The Statute had itself conferred upon such officer, when appointed, the right to the salary established by law, which right this Court spoke of as "absolute." Hence it must follow that the Secretary of the Treasury had no right either to make a regulation or a condition to his appointment which should be in conflict with the Statute, which defined his

powers and which conferred upon his appointee the right to the salary established by law.

Fifth Point.

The appointment of the Petitioner was neither more nor less than an appointment to the office.

The majority opinion of the Court of Claims uses different language in different places as describing the letter of appointment.

It is spoken of as "the Secretary's request" and as "the equivalent of a detail to service" and also as "a conditional appointment." (fol. 10).

(1). But to describe the words of the Secretary "you are hereby appointed" as a *request* is "an abuse of the dictionary," and an extraordinary charge of ignorance of the meaning of words against Secretary Foster.

(2). To speak of it as a "detail to service" is also entirely unjustifiable.

It was an "*appointment*" to this office "*the appointment* to take effect from date of oath."

(3). Conditional appointments are not known to the law. The Secretary had no power to make a *conditional* appointment. The Statute directed the Secretary *to appoint* and that was all.

The further language of the Court that the appointment had "conditions which rendered it a mere detail to service" is an erroneous statement. The duties of the two offices were entirely distinct. The Secretary had no power to attach any condition to it. And it was no more a "detail to service" than any other appointment. And the un-

authorized attempt of the Secretary to repeal the compensation could not legally have any effect on the appointment.

It surely could never be allowed that the appointing power by adding to its words of appointment the words "without compensation" could change an appointment, which the Statute commanded him to make, into a mere "detail of service." Nor could it be allowed that the appointing officer can at his arbitrary will detail one officer to do the work of another, when the Statute required the Secretary "to appoint." That would be to disregard the express commands of the law.

(4). The Majority Opinion also says (fol. 9) that "the question arises whether the Secretary of the Treasury had power to *devolve the duties* of Special Inspectors of Foreign Steam Vessels without additional compensation upon local inspectors of hulls."

The opinion then says that "the incumbent of any one office cannot be required to perform duties, however slight, belonging to another office without the corresponding right to claim whatever salary there may be attached to the second office."

It is extraordinary that the Court did not see that this language called for a decision in favor of the Petitioner.

If the letter of the Secretary of the Treasury did "*devolve* the duties of Special Inspector of Steam Vessels" upon the Petitioner as Inspector of Hulls he was thereby "*required* to perform" those duties, however slight; and therefore he had the "corresponding right to the Salary" attached by Statute. And if the letter of the Secretary was

an appointment to the office, of course he became entitled to the salary. In either case therefore the Petitioner became entitled to the Salary which he claims.

Sixth Point.

The fact that no bond was required or given is immaterial. The Petitioner was an officer not only de facto but also de jure.

Furthermore the majority opinion seems to hold that the fact that the Petitioner did not give a bond prevented him from being an officer *de jure*, but left him only an officer *de facto*, and therefore not entitled to the salary of the office.

Noting the admission in this holding that the appointment of the Petitioner was not merely a "detail to service" but made him an "*officer* de facto," we proceed to show that he was not only that, but also an officer "de jure," and is therefore entitled to the salary.

(*a*). The language of the 4th Section of the Act under which the claimant was appointed is as follows:

"§4. Each Special Inspector of Foreign Steam Vessels shall execute a proper bond, to be approved by the Secretary of the Treasury in such form and upon such conditions as the Secretary may prescribe, for the faithful performance of the duties of his office."

No such form and conditions were ever prescribed.

This Statute is not like some other Statutes of the United States, which provide that an official

must give a bond *before entering upon* the duties of his office. *No such requirement is made in this Statute.* The decision of the Court below is that an officer duly appointed and duly commissioned, who is not required to give a bond before entering on the duties of the office, but who enters upon a performance of the duties of the office, is not an officer *de jure* until he gives a bond.

It seems to us that a more dangerous proposition for the United States could hardly be presented. We are sure that this Court will refuse, as it has always done, to lend countenance to any such defense for defaulting officers of the United States.

The contrary has been held even where the Statute required a bond to be given *before entering on* the duties of the office.

(*b.*) The case of the United States v. Bradley, 10 Peters, 343, was an action on an official bond. Hall had been appointed paymaster on the 26th of May, 1818. A year after, on the 26th of May, 1819, he gave the bond in question. The Statute under which he was appointed provided that officers should give bonds *previous to entering on the duties* of their respective offices. The point was taken, in a defense of the suit brought on the bond, that Hall was not paymaster until he had given that bond. But the Supreme Court said (p. 364): "We are of a different opinion. Hall's appointment as paymaster was complete when his appointment was duly made by the President and confirmed by the Senate. The giving of the bond was a mere ministerial act for the security of the Government, and *not a condition precedent to his authority to act as Paymaster.*" That language is

exactly applicable to the present case. The appointment of the claimant here was complete when his appointment was duly made by the Secretary of the Treasury. And the giving of any bond would have been merely a "ministerial act for the security of the Government." It was not even required to be given by the claimant in this case previous to his entering on the duties of his office. This case is, therefore, *a point-blank* decision of this Court in our favor.

The United States v. Linn, 15 Peters, 290, was also a suit on an official bond. This Court in that case said (p. 313): "The emoluments were the consideration allowed Linn for the execution of the duties of his office, *and his appointment and commission entitled him to receive this compensation, whether he gave the security or not.*" The Court then referred to the above case of The U. S. v. Bradley and said "according to this doctrine, which is undoubtedly sound, *Linn was a receiver de jure as well as de facto when the instrument in question was given.*"

Another case is U. S. v. LeBaron, 19 How., 73. In this case this Court used the following language: "When a person has been nominated to an office by the President, confirmed by the Senate, and his commission has been signed by the President and the seal of the United States affixed thereto, his appointment to that office is complete. Congress *may provide* that certain acts shall be done by the appointee before he shall enter on the duties of the office under his appointment. Those acts *then* become conditions precedent to the complete investiture of the office."

But in the present case, Congress *has not provided* that the bond should be given by the ap-

pointee before he should enter on the duties of his office. In that case this Court held that the appointee was duly commissioned and possessed the office *before* he gave the bond. That case, also, therefore, is a direct authority to hold that the claimant in this case was possessed of the office when he received the appointment and took the oath of office.

The case of the United States v. Eaton (169 U. S., 33), is to the same effect. In that case the law required that Eaton should give a bond before he entered on the execution of his trust. The accounting officer had refused to allow him compensation for the period before he gave the bond. But the Supreme Court referring to the previous cases of the United States v. Bradley and the United States v. Linn, and the United States v. LeBaron, and the United States v. Flanders, held that Eaton was entitled to his compensation for the period *before he gave the bond.*

All the above decisions hold that when one has been appointed to an office, has received his commission, and has taken the oath, (which by Section 1756 of the Revised Statutes he is required to take as a condition precedent to entering on the duties of the office), and then enters upon the duties of the office, he then has become invested with the office. Therefore the claimant in this case became invested with the office on the 25th of May, 1891, when he took the oath of office and entered on his duties. And that being so, the *Statute of the United States* entitled him to the compensation which Congress had affixed to the office.

The majority opinion has cited several cases to support the doctrine that the Petitioner *must be* an

officer *de jure* in order to recover, which never was denied. It has disregarded the cases, though they were discussed in the minority opinion, which decided that he *was* an officer *de jure*.

(*c*). To the above considerations should be added that as the form and conditions of the bond were to be prescribed by the Secretary and the bond approved by him, and as no form or conditions were ever prescribed by the Secretary, the Petitioner could not give a bond by reason of the default of the Secretary. And such failure could not deprive him of his rights to compensation. (Minority Opinion fol. 15).

(*d*). And when the appointment stated "appointment to take effect *from the date of oath*," it would be most unjust to claim that it did not take effect when he took the oath and would not till the appointee gave a bond.

Seventh Point.

The Petitioner was not called upon to protest against the illegal clause of the appointment.

The next point made by the majority opinion is that the Petitioner was guilty of fraud in being silent. It says that it would be such if the transaction were between individuals. But it seems to us that, if a corporation had passed a resolution directing its President to appoint a Superintendent and had also resolved that his salary should be $2,000 a year, and the Superintendent had been appointed and had performed the duties, if the cor-

poration refused to pay the salary, because the President without authority had written him that the salary would not be paid, the fraud would be on the side of the corporation, not of the Superintendent.

But of course this is no transaction between individuals. The Petitioner and the Secretary were not on equal terms. The Secretary had no right to place the appointee in a position where he would not dare to object to a violation of the law lest (as the Circuit Court says in Miller v. The U. S., 104 Fed. Rep. 415), "he should risk discharge from the office which he already held," or as the Minority Opinion says (fol. 16), "his resignation of the office of Local Inspector might have been called for and the compensation of that office lost to him." And he not only had no right but no legal power to do so.

Eighth Point.

The Petitioner waived nothing—any such waiver is contrary to public policy.

The Majority Opinion also holds that the fact that the Petitioner did not protest against this illegal attempt to deprive him of his salary amounts to a waiver of his right to the salary. And this, as the Minority Opinion says, is the vital question in the case.

On this question we maintain that the claim of the Petitioner is sustained both by public policy and by authority.

"Any bargain whereby, in advance of his appointment to an office with a salary fixed by legislative authority, the appointee attempts to agree with the individual making the appointment that he will waive all salary or accept less than the statutory salary is contrary to public policy and should not be tolerated by the Courts." (Miller v. U. S., 103 Fed. Rep. 415).

"It would lead to the gravest abuses, if a candidate and the executive officer who appoints him may combine together so as entirely to exclude from consideration the whole class of men who are willing to take the office on the salary Congress has fixed but will not come for less. And if public policy prohibit such a bargain in advance it would seem that a Court should be astute not to give effect to such illegal contract by indirection as by spelling out a waiver or estoppel." Id. Id.

"In the interest of the public service the weight of authority undoubtedly is against the validity of waiving and perhaps of pledging official compensation to accrue for services to be rendered, or to satisfy the same by a less amount, even though a receipt be given for the same (Fisher's Case 15 C. Cls. R. 323)"

In the case of Satterlee v. The Board of Police 75 N. Y., Rep. p. 38 the same rule was laid down by the Court of Appeals of New York. The Board of Police had appointed Satterlee a surgeon, by a resolution which stated that his salary would be $1,500. But the Statute of the State had fixed the salary of such a surgeon at $2,250. Satterlee accepted the appointment of the Board, performed the duties of the office for over two years, drew his

salary as fixed by the Resolution of the Board and sued to recover the rest of the salary fixed by the Statute. And he recovered it.

The Court of Appeals said, "Fixing the amount at a less rate by resolution could not make it less than the Statute declared. There is no principle upon which an individual appointed to a position can be compelled to take less than the salary fixed by law. The acceptance and performance of the duties of the office after appointment is not a waiver of the Statutory provisions fixing the salary therefor, and does not constitute a binding contract to perform the duties of the office at the sum named. The law does not recognize the principle that a board of officers can reduce the amount fixed by law for a salaried office, and procure officials to act at a less sum than the Statute provided, or that such official can make a binding contract to that effect. The doctrine of waiver has no application to any such case, and cannot be invoked to aid the respondent."

The majority opinion of the Court of Claims seeks to avoid this case by saying that " in that case there was no question of the full and complete regularity of the appointment and of the performance of every undiminished duty under it (Record fol. 11)."

The only difference between the appointments in the two cases is that in the Satterlee case, the appointing power sought to *diminish* the salary fixed by the Statute, while in the present case the effort was to *take it away entirely.*

And in this case the Court below has itself found that the Petitioner "performed the duties of said office" for three years and two days (fol. 7).

There is therefore no difference between this case and the Satterlee case.

The case of the U. S. v. Symonds, 120 U. S., 46, is

also an authority to the same effect. In that case the Secretary of the Navy had by a regulation sought to reduce Symond's salary below what the Statute fixed. He continued to perform the duties of the office, accepted the reduced salary as long as he performed them without protest, and then sued to recover the difference. And both the Court of Claims and this Court held that he was entitled to recover.

Ninth Point.

The last paragraph of the Majority Opinion is utterly wrong and shows the carelessness, to say the least, with which the majority considered the case.

The Statute referred to did not apply to the Petitioner but to the Department. Its language is as follows (1 Supplt. to the U. S. Rev. Stat. p. 427): "Hereafter no Department or officer of the United States shall accept voluntary service for the Government."

How the Court could have said that an Act prohibiting any Department or officer of the United States from accepting voluntary service for the Government only related to "employees in the Indian Office" or that the provision forbidding the Secretary to accept voluntary service made the services of the claimant, (which were not voluntary) services rendered "in *his own violation* of the law" is a mystery. If the Judge ever read the provision he most strangely misconceived it.

Tenth Point.

The addition of the words "without additional compensation" in the appointment was beyond the Secretary's power. Such action is not only illegal but dangerous.

It cannot be held that the Secretary of the Treasury had power to repeal Section 9 of the Act of August 7, 1882, so far as the salary of the office was concerned.

It follows logically that the Secretary had no authority to insert in his appointment the words "without compensation;" that those words were void and that the claimant had the right to treat them as such, and that his so treating them was no waiver of anything. We respectfully submit that the doctrine that an appointing officer has power to affix an illegal condition to an appointment, whether it be to increase compensation, to diminish compensation, to withhold compensation, or to require the performance of any other act on the part of the appointee than the performance of the duties of the office, is a doctrine of too great danger to be approved in any way by the Courts of the United States. No appointee to an office should be held bound to any such condition. And the Courts of the United States should not either directly or by any roundabout way of a doctrine of waiver or estoppel give any effect whatever to such illegal action of the appointing power.

The opinion of the two Judges of the Minority of the Court below, supported as it is by the decision of the Circuit Court in the Miller case is far stronger, on grounds both of reason and

authority, than the opinion of the three Judges, who dismissed the petition. The views of the Minority and of the U. S. Circuit Judge should meet with the approval of this Court. And the decision of the Court below should be reversed and judgment in favor of the Petitioner should be decreed.

Eleventh Point.

The decision of the Court of Claims should be reversed and judgment ordered for Petitioner.

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